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Supreme Court, U.S.
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No. 08-603

IN THE

Supreme Court of the United States

LEO VOS, DIRECTOR, MILLE LACS COUNTY, MINNESOTA, FAMILY SERVICES AND WELFARE DEPARTMENT,

Petitioner,

v.

MICHAEL F. BARG, PERSONAL REPRESENTATIVE OF THE ESTATE OF FRANCIS E. BARG,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner has presented compelling reasons to justify a Writ of Certiorari to review the unanimous judgment of the Minnesota Supreme Court that the Minnesota Medical Assistance estate recovery statute, Minn. Stat. § 256B.15, is partially preempted by the federal statute, 42 U.S.C. § 1396p(b)(4)(B), to the extent the Minnesota statute requires recovery against assets in which a medical assistance recipient did not have, under state law, a legal title or interest of value at the time of the recipient's death.

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STATEMENT OF THE CASE

This case concerns the conflict between the language of the federal medical assistance recovery statute and the Minnesota recovery statute. Federal Medicaid recovery law, as expressed in 42 U.S.C. § 1396p(b)(1), restricts recovery. The statute begins with the language

> No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except that the State shall seek adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan in the case of the following individuals: . . . .

Of the three exceptions in which recovery is allowed, only one is applicable. Title 42 U.S.C. § 1396p(b)(1)(B) states: "In the case of an individual who is 55 years of age or older when the individual received medical assistance, the State shall seek adjustment or recovery from the *individual's estate*. . . ." (emphasis supplied). Minn. Stat. § 256B.15 requires that medical assistance benefits correctly paid on behalf of a deceased recipient be recovered from the estate of that recipient's surviving spouse, limited only to the value of assets of the *surviving spouse's estate* that were marital property or jointly owned property at any time during the marriage. The Minnesota statute therefore requires recovery of assets from the surviving spouse's probate estate which were transferred by the recipient to the surviving spouse during the recipient's lifetime.

Dolores Barg, the predeceased medical assistance recipient, made certain asset transfers to her spouse during her lifetime. These assets were protected for Dolores' spouse under Medical Assistance program guidelines. Transfer of these assets was required by program guidelines if they were to remain protected for the spouse. They were proper, required by Petitioner, and not fraudulent. Following transfer, the deceased recipient had no legal title or other interests of value in these assets during her lifetime and no interest of value in these assets at the time of the recipient's death. The Minnesota Supreme Court held that the federal statute partially preempts the Minnesota statute and prohibits recovery of medical assistance benefits from the Estate of Francis E. Barg under the facts of this case.

Material Stipulated Facts

Dolores J. Barg was born in 1926, married Francis E. Barg in 1948, and remained married to him until her death in January 2004. In 1962 and 1967, Francis and Dolores Barg took title as joint tenants to real property in Princeton, Minnesota, which qualified for homestead treatment under medical assistance guidelines. On October 24, 2001, Dolores Barg entered a nursing home in Mille Lacs County, Minnesota, and began paying privately for care. In December 2001, she applied for Medicaid benefits for long-term care. An asset assessment was completed in February 2002. The Bargs' marital assets, including their homestead, totaled $137,272.63. Dolores Barg received approval for long-term benefits effective December 1, 2001. On July 2, 2002, Dolores Barg, acting through her guardian, and pursuant to Court order, transferred her joint tenancy

interest in the homestead property to her husband Francis Barg. In July 2002, the guardian also terminated Dolores Barg's ownership in certain certificates of deposit previously held jointly by the couple. There is no allegation that these actions were improper or fraudulent.

Dolores Barg died January 1, 2004, after receiving $108,413.53 in Medicaid benefits. Francis Barg died May 27, 2004, having never received Medicaid benefits. At the time of Francis Barg's death, the homestead, legally titled in his name alone, was valued at $120,800. Francis Barg's Last Will nominated his son Michael F. Barg to serve as Personal Representative. The Will left Francis Barg's estate to his surviving descendants, making no provision for his deceased wife Dolores.

On July 30, 2004, Petitioner Mille Lacs County filed a claim against the probate estate of Francis Barg, seeking recovery of $108,413.53, the full amount of benefits paid on behalf of Dolores Barg. The Personal Representative disallowed $44,533.53 of the claim and allowed $63,880. Petitioner Mille Lacs County then petitioned the District Court to allow the full claim.

District Court Decision

The Mille Lacs County District Court awarded Mille Lacs County $63,880, which was the amount of the claim previously allowed by the Personal Representative. This award included the $58,880 Minnesota Department of Human Services valuation of Dolores' life estate in the homestead at the time of her death, and a $5,000 personal property allowance for a *surviving spouse*

pursuant to Minn. Stat. § 524.2-403, even though Dolores predeceased her husband Francis. The District Court based its decision on *In re Estate of Gullberg*, 652 N.W.2d 709 (Minn. Ct. App. 2002). In *Gullberg*, the Court of Appeals determined that although a predeceased recipient spouse had transferred all legal title to his homestead to his surviving spouse before his death, the predeceased spouse still had "some legal interest" in the homestead because the parties were married at the time of the predeceased spouse's death. The *Gullberg* court remanded the case to District Court to determine the nature and characteristics of that interest, but the case was settled without the District Court making any findings on this issue. The *Gullberg* Court suggested that the value of the interest might be determined either by application of a marital property analysis, or by application of the intestacy statutes in favor of a surviving spouse. The Court determined that 42 U.S.C. § 1396p(b) partially preempted Minn. Stat. § 256B.15, Subd. 2, to the extent that Minnesota law required recovery against the probate estate of the *non-recipient surviving spouse* up to the value of the assets of the estate that were marital property or jointly owned property *at any time during the marriage*. The County appealed.

Minnesota Court of Appeals Decision

The Court of Appeals granted the petition of the Minnesota Commissioner of Human Services to participate in oral argument. The Court of Appeals, also relying on *Gullberg*, agreed that the County's ability to recover against the estate of the surviving spouse was limited to the recipient's interest in marital or jointly

owned property at the time of the recipient spouse's death. *Barg* at 496. However, the Court decided that Dolores Barg retained a joint tenancy interest in the homestead at the time of her death even though she had *conveyed* the homestead by guardian's quit claim deed to her spouse *during her lifetime*. The Court valued the interest as an undivided one-half interest and remanded the case to the District Court to recalculate the value of the allowable claim. The County petitioned the Minnesota Supreme Court for discretionary review.

Minnesota Supreme Court Decision

The Minnesota Supreme Court granted the County's petition for discretionary review of the District Court's judgment. The Court also granted the Personal Representative's request for review of the question whether federal law prohibited recovery from a non-recipient spouse's estate under the stipulated facts. The Court granted the requests of the Minnesota Commissioner of Human Services, represented by the Minnesota Attorney General, to file an *amicus curiae* brief supporting the County and to participate in oral argument. The Elder Law Section of the Minnesota State Bar Association and The National Senior Citizens Law Center were granted leave to jointly file an *amici curiae* brief supporting the Estate of Francis E. Barg. The Minnesota Supreme Court heard oral argument and requested supplemental briefs following oral argument to clarify how some amendments of the Minnesota recovery statutes in 2005 affected the scope of recovery allowed under Minnesota law.

Following submission of the supplemental briefs, the Minnesota Supreme Court held that federal Medicaid law does not prohibit all recovery from the estate of a surviving spouse who did not receive Medicaid benefits, but that federal law does not allow recovery from assets in the probate estate of a non-recipient surviving spouse if the recipient did not have an interest of value in those assets at the time of the recipient's death. The Court, citing the plain language of the federal statute, disagreed with the decision of the Minnesota Court of Appeals in *Barg* and by implication limited the decision of the Court of Appeals in *Gullberg*. The Court concluded that

> . . . for an interest to be . . . recoverable from a surviving spouse's estate, the interest must be (1) an interest recognized by law, (2) which the Medicaid recipient held at the time of death, and (3) that resulted in a conveyance of an interest of some value to the surviving spouse that occurred as a result of the recipient's death.

(Pet. App. at 39a). The Court decided that Minn. Stat. § 256B.15, Subd. 2, was therefore preempted by federal law "to the extent that it allows recovery from assets in which the deceased Medicaid recipient did not have a legal interest at the time of death, and to the extent that it permits recovery beyond the extent of the recipient's interest." (Pet. App. at 43a).

The Minnesota Court summarized its conclusion

> We conclude that Dolores had no interest in assets at the time of her death that were part of a probate estate or an expanded estate definition permissible under federal law, and therefore there is no basis for the County's claim against the Estate.

(Pet. App. at 40a).

REASONS FOR DENYING THE PETITION

No compelling reasons have been presented by Petitioner as a basis for granting the Petition. *See* Sup. Ct. R. 10. The thorough, well-reasoned unanimous Opinion of the Minnesota Supreme Court is supported by the decisions of several other state Supreme Courts and Courts of Appeals. The only conflict of authority is with one other state Supreme Court, which did not appear to fully review the federal statute governing medical assistance recovery. The Minnesota Supreme Court upheld the federal law but limited the application of those portions of the Minnesota recovery statute which the Court found directly in conflict with the federal statute. Petitioner is seeking review to obtain a judicial decision which ignores the public policy decisions enunciated by Congress in the federal Medicaid recovery statute, rather than seeking a legislative change. The Petitioner is seeking review because it disagrees with the plain language and policy of the federal statute.

I. *The Minnesota Supreme Court Determined Minnesota's Medical Assistance Recovery Law Is Partially Preempted by Federal Law*

The Minnesota Supreme Court began its analysis by thoroughly examining whether federal law preempts Minnesota law. The Minnesota Court recognized that "Our primary focus in the analysis must be to ascertain the intent of Congress." The Court noted a U.S. House Report describing the amendments made by the Omnibus Budget Reconciliation Act of 1993 to 42 U.S.C. § 1396p. The Court pointed out, "When the House wanted to describe recovery from the surviving spouse's estate, it said so clearly." Importantly, the Court noted that the amendments to 42 U.S.C. § 1396p(b)(1)(B) actually passed by Congress in 1993 eliminated the House reference to recovery from the surviving spouse's estate and focused recovery on the *recipient's estate alone*. The federal statute as adopted, the Court stated, "contained no express authorization for, or reference to, recovery from a surviving spouse's estate." (Pet. App. at 11a). The Minnesota Supreme Court looked carefully at the federal statutory language to determine whether it preempted Minnesota law "to the extent it actually conflicts with federal law." The Court decided that Congress did not intend to preclude all recovery from the estate of a surviving spouse, but concluded that, "There is no principled basis on which to interpret the federal law to allow recovery of assets in which the Medicaid recipient did not have an interest at the time of her death." (Pet. App. at 36a). The Court stated, "The language of the federal law clearly limits" the expanded definition of estate in the 1993 amendments "to assets in which the recipient had an interest at the

time of her death." (Pet. App. at 36a, 37a). Therefore, the Court determined the Minnesota recovery statute "is partially preempted to the extent that it authorizes recovery from the surviving spouse's estate of assets that the recipient owned as marital property or as jointly owned property *at any time during the marriage*. To be recoverable, the assets must have been subject to an interest of the Medicaid recipient *at the time of her death*." (emphasis supplied) (Pet. App. at 37a).

II. *The Plain Language of 42 U.S.C. Regarding Transfers by "Other Arrangement" Is Misconstrued by Petitioner*

Petitioner Mille Lacs County argues that the Minnesota law allowing recovery against the estate of the surviving spouse allows Minnesota to recover the value of assets of the surviving spouse's estate "that were marital property or jointly owned property at any time during the marriage." This Minnesota language includes assets lawfully transferred by the predeceased recipient spouse prior to the recipient's death. In support of this position, the County argues that the language of 42 U.S.C. § 1396p(b)(4)(B) allowing recovery of assets transferred by the recipient through "other arrangement" includes transfers made by the recipient to the recipient's surviving spouse at any time during the marriage and includes assets transferred *prior* to recipient's death. The County relied heavily on the decision of the North Dakota Supreme Court in *In re Estate of Wirtz*, 607 N.W.2d 882 (N.D. 2000). The

Minnesota Court rejected the County's argument, stating that this argument would:

> take us too far down the path of favoring the purpose of the law at the expense of the plain meaning of its language. Significantly, no Court has embraced the County's argument that the pre-1993 federal law authorized recovery from a surviving spouse's estate of assets that were jointly owned during the marriage but transferred by the recipient spouse prior to her death. Indeed, of the Courts that have interpreted federal law to allow direct claims against the estate of a surviving spouse, only one has construed that authority to extend to assets that were transferred before the death of the Medicaid recipient, and that Court relied on the language from the 1993 amendments to support that extension. (Pet. App. at 31a, 32a).

The one court at variance with the other courts was the North Dakota Supreme Court in *Wirtz*. The *Wirtz* Court relied primarily on the words "other arrangement" at the end of § 1396p(b)(4)(B). The North Dakota Court characterized the term "other arrangement" as being ambiguous and therefore allowed the State wide latitude in seeking Medicaid reimbursement. The Minnesota Supreme Court noted that prior to *Wirtz*, the North Dakota Supreme Court in *In re Estate of Thompson*, 586 N.W.2d 847 (N.D. 1998), decided that recovery allowed under § 1396p(b) is *limited to assets in which the Medicaid recipient had*

an interest at the time of death. The Court then stated, however, that the *Wirtz* Court later determined that the Congressional intent in that law allows states "wide latitude in seeking Medicaid benefit recoveries." Pointedly, the Minnesota Court noted that the *Wirtz* Court *did not explain* why it abandoned the restriction acknowledged in *Thompson* when it allowed broader recovery in *Wirtz*.

The Minnesota Supreme Court thoroughly and carefully analyzed the meaning and context of the phrase "other arrangement" as it relates to transfers of property by a recipient. The Court concluded

> We cannot agree that the "other arrangement" language in the 1993 amendment is ambiguous in the sense applied in *Wirtz*. The plain meaning of "other arrangement," read in the context of section 1396p(b)(4), is arrangements other than those expressly listed that also convey assets at the time of the Medicaid recipient's death.

(Pet. App. at 34a).

The Court continued that "To read 'other arrangement' to include a lifetime transfer would be to read the words 'at the time of death' out of the statute." (Pet. App. at 36a).

Finally, the Minnesota Court concluded, "In light of the plain statutory language in its context, the conclusion of the *Wirtz* Court that 'other arrangement' is sufficiently ambiguous to include *lifetime transfers is unreasonable*." (emphasis supplied) (*Id.*). Given this

very careful analysis of the statute by the Minnesota Supreme Court and the rather cursory analysis by the North Dakota Court, there is no serious conflict between these Courts.

III. *Federal Law Does Not Make Spouses Jointly Liable for Reimbursement of Medical Assistance Received by Only One Spouse*

After the Minnesota Supreme Court found that the Minnesota recovery statute is partially preempted by federal law and that the definition of estate with respect to a deceased individual recipient under federal law does not include completed transfers made by the recipient during the recipient's lifetime, the Court specifically examined whether Dolores Barg had any interest of value in her spouse's property *at the time of her death.* The Court concluded she did not.

Petitioner alleges to this Court that the Minnesota Supreme Court misconstrued the assets of the deceased individual from which recovery may be made. Petitioner argues 42 U.S.C. § 1396p(e)(1) defines the recipient's assets as all income and resources of the individual and of the individual's spouse, and further argues the Court erred in not reading that definition into § 1396p(b)(4)(B) where the federal statute allows recovery "against other assets in which the individual had any legal title or interest *at the time of death.*" (emphasis supplied).

Since 1987 when Minnesota adopted the statutory provision allowing recovery against the assets of the deceased recipient and those of the surviving spouse's estate, the State of Minnesota has sought to impose

joint and several liability on the recipient and the recipient's spouse *under Minnesota law* for reimbursement of correctly paid medical assistance benefits. The Minnesota Court addressed this issue in its Opinion and concluded that "When determining the eligibility of a married person to receive Medicaid, states consider assets of both husband and wife as available to the spouse requesting benefits." (Pet. App. at 8a). But, the Court then explained there are provisions in place to protect the community spouse and many assets are not included in determining whether an individual is eligible to receive medical assistance. Among those protected assets are the homestead of the parties and the allowance of income and assets designated for the community spouse's needs. These protected assets are not available to pay for the recipient spouse's medical care. (Pet. App. at 9a). The Minnesota Court distinguished the federal statutes which govern eligibility for benefits from those which govern recovery of benefits. The Court rejected the contention of Petitioner that the term "assets" in § 1396p(b)(4)(B) is not restricted by the plain language in § 1396p(b)(4)(B). As part of that analysis the Court determined that decedent's transfers by "other arrangement" included only assets conveyed to a survivor *at the time of the recipient's death*. Any other interpretation, the Court said, would read the words "at the time of recipient's death" out of the statute. The Minnesota Court throughout this Opinion emphasized it resolved these matters by examining the plain language of the federal statute and finding *Minnesota law* was in conflict.

IV. *The Minnesota Supreme Court Applied Minnesota Law to Determine That Recipient Dolores Barg Had No Interest of Value in Any Asset of Her Spouse at the Time of Her Death*

The Minnesota Supreme Court's Opinion in this case turns on the Court's interpretation of property rights between spouses *under Minnesota law*. In Section IV, the Court addressed whether deceased recipient Dolores Barg "had any interest in property at the time of her death that would allow the County to make a claim against the estate of her surviving spouse, despite her transfer of her joint interest in the property prior to her death." (Pet. App. at 37a). The Court concluded she did not, because her interest in the property was "effectively and legally transferred before her death." (Pet. App. at 38a). The Court even looked at whether Dolores "had any other interest in the property at the time of her death that may be considered part of an expanded estate for recovery purposes under Minnesota law." (*Id.*). The Court found no marital interest *under Minnesota law*, and no other interest of any kind.

Then, applying both real property law principles and probate law principles *under Minnesota law*, the Court found that "Any interest recognized must be consistent with the underlying foundational rationale that recovery from a surviving spouse's estate is allowed only because of its relationship to the recipient's estate, from which federal law expressly allows recovery." (Pet. App. at 39a). The Court directly rejected the County's argument that the Minnesota medical assistance recovery statute,

Minn. Stat. § 256B.15, Subd. 2, provided to the contrary, stating

> The County argues that the reference to marital property in subdivision 2 reflects the Minnesota legislature's intent to make all marital property subject to spousal estate recovery. But subdivision 2 makes no reference to an interest at the time of death or to re-defining the probate estate to include all marital property, even property transferred prior to death. This is not surprising because subdivision 2 was enacted long before the optional estate definition authority was added to federal law.

(Pet. App. at 40a).

The Minnesota Supreme Court also recognized that the District Court, pursuant to *Gullberg*, found Dolores Barg had retained some interest even after her lifetime transfer of her interest in her homestead to her spouse because she was married to that spouse at the time of her death. However, the Supreme Court disagreed: "Whatever that interest, it dissipated at Dolores' death, rather than resulting in transfer of an interest of value to Francis." (*Id.*). This was a direct reference to Dolores' unvested, inchoate probate interest as a surviving spouse *under Minnesota law*. But here, Dolores *predeceased her spouse and therefore had no such interest*, the Court determined. The Court also noted that even Minnesota's 2003 expanded definition of estate for Medicaid recovery purposes which includes assets owned by the recipient in a joint tenancy or life estate *at the time of death* does not apply in this case,

because Dolores had made a *lifetime transfer* of her joint tenancy interest in the homestead. Also, the Minnesota legislature, the Court cautioned, made the provisions continuing life estates and joint tenancies "effective only for life estate and joint tenancy interests created on or after August 1, 2003." (Pet. App. at 41a). The stipulated facts in this case show Dolores Barg conveyed her joint tenancy interest in 2002.

Based on this very careful examination of *Minnesota law*, the Court wrote, "We hold Dolores Barg had no interest in property at the time of her death that can form the basis for recovery against the estate of Francis Barg." (Pet. App. at 43a).

V. *Courts of Other Jurisdictions Agree with the Minnesota Supreme Court Decision*

The Minnesota Supreme Court decision clearly aligns with the Courts that have thoroughly and carefully reviewed the plain meaning of the federal statute. The Minnesota Court cited the decisions of the Illinois Supreme Court in *Hines v. Department of Public Aid*, 850 N.E.2d 148 (Ill. 2006) and the Wisconsin Court of Appeals in *In re Estate of Budney*, 541 N.W.2d 245 (Wis. Ct. App. 1995) as support for the proposition that the federal recovery statute restricts recovery from the estate of a surviving spouse. The Minnesota Court specifically pointed to the language from *Hines* that "No provision is made for the collection from the estate of the recipient's spouse." (*Hines* at 153). The *Hines* Court extended its analysis even further when it explained that initially the community spouse is allowed to retain assets and income that do not have to be spent

for the care of the recipient spouse. The *Hines* Court said the rationale for the federal statute not allowing claims against the estate of the surviving spouse is that, "The Medicaid Act affords *an additional element of financial protection* to the families of Medicaid recipients by *limiting the circumstances* in which a state may seek reimbursement for the payments it made on the recipient's behalf." (emphasis supplied) (*Hines* at 152). The *Hines* Court also characterized the language of the federal statute as "*clear and unambiguous*" and because of that "*the Court must enforce it as written.*" (emphasis supplied) (*Hines* at 153).

The Minnesota decision also noted that the *Budney* Court explained that the federal statute never "counter[ed] the initial blanket prohibition on recovery by authorizing recovery from the surviving spouse's estate." (Pet. App. at 21a).

The Tennessee Court of Appeals in *In re Estate of Smith*, 2006 WL 3114250 (Tenn. Ct. App. 2006) noted that, similar to the stipulated facts in *Barg*, Mrs. Smith transferred certain property to her husband before she died and "Counsel for the parties informed the Court that this transfer to the husband was contemplated, if not required, by Medicaid. *See* 42 U.S.C. § 1396r-5(f)." (*Smith* at 2, footnote 1). The Court quoted the language of that statute in part: "An institutionalized spouse may . . . transfer an amount equal to the community spouse resource allowance. . . . This transfer . . . should be made as soon as practical after the date of the initial determination of eligibility. . . ." (*Id.*). The Tennessee Court cited both the *Hines* and the *Budney* decisions with approval. Again, the Tennessee Court, referring

to the *Wirtz* conclusion to the contrary, indicated it "must respectfully disagree with the rationale of *Wirtz*" because under the federal statute to be recoverable "an asset must be one in which the recipient had a 'legal title or interest at the time of death'." (*Smith* at 5).

VI. *The Minnesota Supreme Court's Refusal to Defer to Approval of Minnesota's State Medicaid Plan by the Centers for Medicare and Medicaid Services Is Not a Compelling Reason to Approve This Petition*

The Minnesota Commissioner of Human Services argued that approval of Minnesota's estate recovery statute in 2007, as part of federal administrative approval of recent amendments of Minnesota's Medical Assistance State Plan, required deference to the administrative interpretation of the applicable federal statute. Although the Minnesota Commissioner of Human Services as *amicus curiae* submitted a copy of such approval to the Minnesota Supreme Court as supplemental authority July 9, 2007, the Court did not make this submission part of the record.

Instead, the Minnesota Court, initiated the discussion of federal preemption of a state statute with the statement that "Whether federal law preempts state law is primarily an issue of *statutory interpretation*, which we review de novo." (emphasis supplied) (Pet. App. at 18a). This approach is supported by the Court's citation with approval to *Martin ex rel. Hoff v. City of Rochester*, 642 N.W.2d 1 (Minn. 2002). In *Martin* the Minnesota Supreme Court discussed the deference due federal agencies under *Chevron, U.S.A., Inc. v. Natural*

Resources Defense Council, Inc., 467 U.S. 837 (1984) when the Court is engaged in statutory interpretation. Among other things the Court determined that "When an agency statement does not reflect formal rules or agency adjudications, yet attempts to address an ambiguity in the law, deference to the agency under *Chevron* is not appropriate." (Martin at 24). The Court in *Martin* also concluded that "Deference to agency interpretation is called for . . . only when there is an ambiguity in the expression of Congressional intent." (*Id.*).

Then, in its examination of the 1993 amendments to the federal recovery statute, which expanded recovery provisions, the Minnesota Court concluded, "The language of the federal law clearly limits that expansion to assets in which the recipient had an interest at the time of her death." (Pet. App. at 37a). Throughout its Opinion, the Minnesota Supreme Court described the statutory language as "plain statutory language." (Pet. App. at 36a). Therefore, the Court found no ambiguity and no need to defer to any agency to perform the Court's function of statutory interpretation.

VII. *The Petitioner Ignores the Plain Language of the Federal Statute in Favor of Broad Public Policy Arguments*

The United States Supreme Court's Rule 10 allows a writ to be granted for "compelling reasons." Petitioner alleges the Minnesota Supreme Court misconstrued federal law despite its rigorous and well-explained examination of federal statutes and a unanimous

decision of the Court. Petitioner minimizes and often ignores the plain language of the federal statute in explaining why the Court erred. Instead, Petitioner argues public policies not adopted by Congress instead of the plain language of 42 U.S.C. § 1396p(b).

In its Petition for Rehearing to the Minnesota Supreme Court, Petitioner alleged for the first time that Minnesota Medicaid benefit recoveries would be reduced by a dollar amount which is not a part of the record of the case. In its petition to this Court, the County alleges an even larger amount of loss. These unsubstantiated numbers are offered in support of Petitioner's argument that public policy, rather than the plain language of the federal statute, must control. These allegations are not facts in evidence and are not relevant to this Court's decision whether to grant certiorari.

The Minnesota Supreme Court instead relied on the rule of law, as expressed in the plain language of the federal statute, which is the expression of the public policy of the United States Congress. (Pet. App. at 23a).

VIII. *Petitioner Relies on Misstatements and Innuendo as a Substitute for Compelling Reasons to Grant Its Petition for This Court's Review.*

From the first page of its Petition for Writ of Certiorari to this Court, Petitioner bases its presentation to the Court on misstatement and innuendo.

A. On page 1 of its Petition to this Court Petitioner phrases the question presented as follows:

> Does 42 U.S.C. § 1396p(b)(4)(B) preempt a state law that requires recovery of Medicaid benefits from the value of assets in a surviving spouse's probate estate regardless of which spouse *formally* owned those assets when the recipient spouse died (emphasis supplied).

Use of the word "formally" diverts attention from the plain language of the federal statute, which allows recovery against "assets in which the individual had any legal title or interest at the time of death (to the extent of such interest) . . ." (42 U.S.C. § 1396p(b)(4)(B)). Implying that ownership of marital assets between spouses is a mere formality, and implying that formal ownership of assets between spouses should be without consequence, is a calculated misdirection by Petitioner.

Neither the federal statute nor the Minnesota Supreme Court's decision in this case discussed "formal" ownership of spousal assets. The federal statute at § 1396p(b)(4)(A) defines estate of the deceased recipient to include "all real and personal property and other assets included within the individual's estate as defined for purposes of state probate law" and in § 1396p(b)(4)(B) allows the state to include additional assets "in which the individual had *any legal title or interest at the time of death* . . ." The Minnesota Supreme Court in setting out the issues presented before it raised questions concerning recovery regarding "assets in which the recipient *had*

an interest at the time of her death." (Pet. App. at 17a). The Minnesota Court held that the Minnesota recovery statute is "preempted to the extent that it allows recovery from assets in which the deceased Medicaid recipient did not have *a legal interest at the time of death*, and to the extent that it permits recovery *beyond the extent of the recipient's interest.*" (emphasis applied) (Pet. App. at 43a). Dolores and Francis Barg initially held their homestead as joint tenants. The conveyance by deed of Dolores Barg's interest to Francis Barg transferred her "legal title and interest" to Francis Barg, not a mere "formal ownership," as Petitioner characterizes it on page 6 of the Petition. Real estate law in Minnesota has no interest called "formal ownership." When individuals take title to real estate by deed and convey title to individuals by deed they are changing ownership, and those changes have important consequences for the legal rights and interests of the parties.

B. In the STATEMENT Petitioner characterized recipient Dolores Barg's lifetime transfer of her one-half interest as a joint tenant in the couple's homestead to her community spouse — which is stipulated by the parties in this case as *allowable* under Minnesota law *and not fraudulent* — as "sheltering assets." (Pet. Br. at 6). Use of the term "sheltering assets" implies that something nefarious is occurring when assets are transferred to a community spouse in accordance with the federal Medical Assistance statutes. When federal statutes allow assets to be protected for a recipient of medical assistance or the recipient's family, there is nothing improper about using the protection provided by federal law.

C. Petitioner in the STATEMENT characterizes the inability of the State of Minnesota to recover all the assets in the non-recipient surviving spouse's estate as a "windfall" to the couple's heirs even though the Minnesota Supreme Court determined otherwise. Petitioner uses this term in a manner designed to disparage Francis and Dolores Barg and their heirs, and to take the focus off the Minnesota Court's determination that the plain language of the federal law does not allow recovery in these circumstances. (Pet. Br. at 6).

D. In the section "Medicaid Estate Recovery and Its Important Purposes" Petitioner claims Medicaid estate recovery serves to "recycle public funds" for other persons through recovery, even though the facts of this case contain no evidence to support the conclusion that recovered funds are part of a fund used for that purpose. Petitioner explained in its brief to the Minnesota Supreme Court that any recovered funds go to the state's general fund, not a dedicated Medicaid fund. (Pet. Br. at 52). The Minnesota legislature decides each year how much of the general fund to appropriate for Medicaid spending during the next budget cycle. The Courts of Illinois, Tennessee and Wisconsin, cited above, all denied recovery against the estates of surviving spouses without regard to the fiscal impact on the State's medical assistance program. The Medicaid program is not a revolving loan fund.

E. In the section "District Court and Court of Appeals Holdings" Petitioner alleges that "Both the District Court and the Court of Appeals held

that recovery on the County's claim was allowed." (Pet. Br. at 14). In fact, these Courts only *partially* allowed the claim based on the earlier Court of Appeals decision in *Gullberg* that a deceased recipient retains an interest after death that can support recovery against assets in the surviving spouse's estate.

F. Petitioner refers to the actual conveyance by deed of the recipient during lifetime as "simply changing the name on the asset before the recipient dies," ignoring the real consequences of terminating ownership by deed, namely that the recipient no longer had any *legal title or interest* in the property. (Pet. Br. at 20). The Minnesota Supreme Court noted that the Minnesota Court of Appeals in *Barg* "looked to standard real property law and *Gullberg* in deciding that Dolores retained a joint tenancy interest" after conveying her interest in the homestead to her spouse during her lifetime. The Supreme Court said plainly and simply, "We do not agree." (Pet. App. at 37A).

G. Petitioner claims in Section III that the Minnesota Supreme Court's decision allows the couple's home "to escape recovery" (Pet. Br. at 29). An asset does not "escape" recovery if the federal statute does not allow recovery against the asset. Again, Petitioner uses this characterization to express its disagreement with the plain language of the federal statute, rather than to accept it.

H. Also in Section III, Petitioner complains that elder law practitioners "defeat estate recovery by capitalizing on the exempt transfers under the

Medicaid rules." (Pet. Br. at 29). Petitioner ignores the fact that the transfers from spouse to spouse are never penalized at any time under federal statute 42 U.S.C. § 1396p(c)(2). Advice by practitioners is no different than advice from tax accountants and tax attorneys regarding lawful financial practices that might reduce a client's tax burden.

These are all examples of Petitioner using repetitive, value-loaded language to divert attention from the plain language of the federal statutes and the public policy decisions of the Congress. Petitioner's disagreement with the plain language of the law and the public policy of the Congress is not a "compelling reason" for the Court to grant this petition.

CONCLUSION

Petitioner has not established any compelling reasons for the Court to grant this Petition. Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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